

Office-Supreme Court, U.S.  
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JUL 8 1983

ALEXANDER L. STEVAS,  
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No. 82-1994

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**In the Supreme Court of the United States**

OCTOBER TERM, 1982

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**KIRBY FOREST INDUSTRIES, INC., PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT**

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioner contends that the court of appeals enunciated an incorrect test for determining the date of taking of its property condemned by the United States pursuant to 40 U.S.C. 257.

On August 21, 1978, the United States filed a complaint in condemnation to acquire approximately 2,100 acres belonging to petitioner in Hardin and Jefferson Counties, Texas, for use as part of the Big Thicket National Preserve (Pet. App. A2; B4). In March 1979 the action was tried before a commission appointed pursuant to Fed. R. Civ. P. 71A (Pet. App. A2). On March 3, 1980, the commission entered its report, recommending an award of \$2,331,202. Both parties filed objections to the report in April 1980. A hearing on the objections was held on January 28, 1981, and, on August 13, 1981, the district court entered judgment in the amount recommended by the commission plus interest at the rate of six percent from the date the complaint was

filed until the date of the deposit of the award (March 26, 1982) (Pet. App. B1-B11; A2).

The court of appeals reversed the award of interest on the basis of this Court's decision in *Danforth v. United States*, 308 U.S. 271 (1939), and remanded the case for further proceedings to correct certain inadequacies in the commission's report (Pet. App. A12-A13). The court held that no interest is due on an award of just compensation prior to the date of taking, which under the circumstances of this case was the date of payment of the award (Pet. App. A11). Rejecting the district court's conclusion that the mere commencement of condemnation proceedings denied petitioner any "economically viable use and enjoyment of its property" (Pet. App. B10), the court of appeals found that the government had neither entered into actual possession nor substantially interfered with petitioner's rights in its property prior to payment of just compensation (Pet. App. A11). The court specifically rejected the rationale of the Ninth Circuit Court of Appeals in *United States v. 156.81 Acres of Land in Marin County, California*, 671 F.2d 336 (1982), cert. denied, No. 82-552 (Dec. 13, 1982).

Petitioner contends (Pet. 13) that the court of appeals improperly rejected the date of the filing of the complaint in condemnation as the date of taking. Whatever the merits of this contention,\* it is not presently ripe for review by this Court. The court of appeals remanded the case to the district court for further proceedings, specifically directing

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\*Because this case is interlocutory, we will not respond on the merits to the questions presented by the petition unless this Court requests that we do so. We note, however, that we believe the reasoning of the court below and the result reached by that court are correct. As we contended in our petition for a writ of certiorari in *United States v. 156.81 Acres of Land in Marin County, California*, No. 82-552, the contrary result reached by the court of appeals in that case conflicts with this Court's decision in *Danforth v. United States*, *supra*.

consideration of petitioner's claim that the compensation awarded should be increased because the land is unique (Pet. App. A12). If petitioner is satisfied with the award on remand, its claims will be moot. If, on the other hand, petitioner is dissatisfied, it will be able to present its contentions to this Court, together with any other claims it may have, in a petition for a writ of certiorari seeking review of the final condemnation award. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE  
*Solicitor General*

JULY 1983